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In The

Supreme Court of the United States

October Term, 1968

No. 411

F. H. SPARKS CO., INC.,

Petitioner,

-v-

THE GEORGE SOLLITT CONSTRUCTION COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the above, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

F. H. Sparks Co., Inc., petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on the 6th day of June, 1968 in the above case in which petitioner was a defendant and respondent was the intervening plaintiff.

CITATION OF OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, printed in Appendix A hereto, is not yet officially reported. The opinion of the same Court on a prior appeal, printed in Appendix B, is reported at 376 F.2d 711.

The opinion of the District Court, printed in Appendix C, is not officially reported.

JURISDICTION

The judgment sought to be reviewed is that of the Court of Appeals for the Seventh Circuit dated and entered June 6, 1968. No rehearing was sought.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. When is an arbitration award "definite" within the meaning of Section 10(d) of the Federal Arbitration Act (9 U.S.C. § 10[d])?

2. Does an arbitration award become indefinite within the meaning of Section 10(d) of the Act because the award fails specifically to mention one of the issues before the arbitrators?

3. Is the definiteness of an award under Section 10(d) of the Act to be determined from the face of the award or may the District Court search the record of the arbitration hearings to determine whether the award is definite?

4. Where a lump sum award, within the scope of a commercial arbitration agreement, recites that it is in full settlement of all claims submitted, may the District Court under Section 10(d) of the Act remand to the arbitrators the question of the arbitrability of a particular portion of one provision of the contract, in which the arbitration provision appears, and which had been urged as a defense before the arbitrators?

STATUTES INVOLVED

The Federal Arbitration Act of 1925, 43 Stat. 883, as amended, 61 Stat. 669, 9 U.S.C. §§ 1-14.

Section 9 thereof (9 U.S.C. § 9), so far as relevant, provides:

> "AWARD OF ARBITRATORS; CONFIRMATION; JURISDICTION; PROCEDURE
>
> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. * * *"

Section 10 (9 U.S.C. § 10) provides:

> "SAME; VACATION; GROUNDS; REHEARING
>
> In either of the following cases the United

States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

STATEMENT OF THE CASE

On May 31, 1966, petitioner, F.H. Sparks Co., Inc. ("Sparks"), a subcontractor of the respondent, The George Sollitt Construction Company ("Sollitt"), the cost-plus general contractor employed by the Arthur T. Galt Building Trust on the construction of a new

spectator building at the Maywood Park Racetrack, outside Chicago, Illinois, commenced an arbitration proceeding against Sollitt to recover the unpaid balance of the subcontract price and for extra work. Sparks and Sollitt designated P. F. DeJongh and F. P. Wiesinger as their respective arbitrators and A. L. Spencer was selected from the American Arbitration Association panel as impartial arbitrator. All three are engineers.

Arbitration hearings were delayed because Sollitt, which had been permitted to intervene as a plaintiff in a tort action to recover damages for glass breakage commenced on September 29, 1966 by the owner and lessee of the racetrack against Sparks and Libbey-Owens-Ford Glass Company, Sparks' glass supplier, obtained from the District Court for the Northern District of Illinois, Eastern Division, an order enjoining the arbitration proceedings. Upon appeal the injunction was dissolved by the Court of Appeals for the Seventh Circuit (Galt v. Libbey-Owens-Ford Glass Company, 376 F.2d 711, opinion annexed hereto as Appendix B).

The arbitration proceedings were promptly thereafter held in Chicago from May 22 to May 25, 1967 and at the conclusion thereof the majority of the arbitrators, consisting of Messrs. Spencer and DeJongh, orally announced their award, with Mr. Wiesinger dissenting.

At that time — not during the hearings, as intimated in the opinion of the Court of Appeals (Appendix, p. 15) — counsel for Sollitt requested that a finding be made that Sollitt was not responsible for the glass breakage. Sparks consented to this finding. No other finding or modification of the award as informally announced by the arbitrators, was requested by Sollitt before it was

reduced to writing and executed (App. 45a).*

The formal award stated: "SOLLITT shall pay to SPARKS the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00)."

Thereupon Sparks moved for confirmation of the award pursuant to Section 9 of the Federal Arbitration Act (9 U.S.C. § 9) and Sollitt cross-moved for its modification by the Court pursuant to Section 11 of the Act (9 U.S.C. § 11). Subsequently Sollitt filed a motion for an order compelling Sparks and Sollitt to submit to the arbitrators the question (1) whether the so-called "payment clause" of the subcontract was within the purview of the arbitration clause** contained in the same subcontract, and the further question (2) whether, if the payment clause was found to be subject to arbitration, Sparks was entitled to receive the amount of the award before Sollitt received it from the Arthur T. Galt Building Trust (App. 38a-40a).

Sollitt based such motion on a certain brief colloquy between Mr. Spencer, the impartial arbitrator, and counsel on the first of the four days of hearings (App. 15a-21a). In this colloquy the payment clause was nowhere either directly or indirectly mentioned.

Sollitt's latter motion was granted and on June 22, 1967 a remand order entered submitting the above two questions to the three arbitrators, each of whom responded by letter to the American Arbitration Association and counsel. Mr. Spencer's letter stated that he did "not feel that these questions should fall within the jurisdiction of the Arbitration Panel for the following

* "App." references are to pages of Appellant's Appendix in the Court of Appeals which has been certified as part of the record herein.

** The payment and arbitration clauses are set forth in footnote "1" of Opinion of the Court of Appeals, Appendix A, P. 16, infra.

reasons:" (Emphasis added.) Among the reasons given by Mr. Spencer was his statement that the payment clause "has been highly questioned as to its equity since in many cases final payment to the contractor can be held up through no fault of the particular Subcontractor" (App. 50a-52a). Mr. DeJongh's letter stated that he agreed with Mr. Spencer that the arbitrators had no jurisdiction to decide how the award should be collected or whether the owner should pay Sollitt and that both questions should be answered in the affirmative (App. 55a-56a). Mr. Wiesinger's letter interpreted Mr. Spencer's letter as deciding that the payment clause was not arbitrable (App. 53a-54a).

Thereupon the District Court entered the order appealed from in which it confirmed the award but reserved for its own decision all questions arising out of the payment clause, including enforceability of the award, the time, terms and manner of its payment and interest thereon (App. 71a-74a).

This order was affirmed by the Court of Appeals which had allowed the appeal under 28 U.S.C. § 1292(b).

Jurisdiction in the District Court was based on 28 U.S.C. § 1332 and 9 U.S.C. § 9 (App. 5a).

REASONS FOR GRANTING THE WRIT

I. Conflict between Courts of Appeal

The decision below held (Appendix A, p. 18):

> "Because the award did not mention the payment clause, even though that was one of the defenses presented to the arbitrators by Sollitt, the award was not definite within the meaning of Section 10(d) of the Act."

This decision is in conflict with the decision of the Court of Appeals for the Second Circuit in Ballantine Books, Inc. v. Capital Distributing Co., 302 Fed. 2d 17 (1962) where that Court stated at pages 21-22:

> "Capital's final contention is that the award should be set aside under 9 U.S.C. § 10(d) as not 'mutual, final and definite' because there were alleged minor disputes involving $4,421.28 which were not specifically disposed of by the general award and because there was disagreement as to which of the two parties owed these amounts to third persons. This argument can readily be disposed of on the principle that it is not for a reviewing court to look behind a lump-sum arbitration award. Cf. James Richardson & Sons Ltd. v. W. E. Hedger Transportation Corp., 98 F.2d 55 (2 Cir. 1938); cert. denied, 305 U.S. 657, 59 S. Ct. 357, 83 L. Ed. 426 (1939). There is no reason not to think that the lump sum included provision for all claims between the parties; it was obviously not the function of the arbitrators to determine whether the third party claimants should go against Ballantine or Capital to collect these amounts."

The two decisions give contrary interpretations to the word "definite" as used in Section 10(d) of the Act, the Seventh Circuit holding that a lump sum award is not definite unless it specifically mentions one of the defenses presented to the arbitrators, and the Second Circuit holding that a lump sum award is definite even though it fails specifically to dispose of one of the disputes presented to the arbitrators.

II. The decision below has determined an important question of federal law which is either (A) in conflict with applicable decisions of this Court or (B) has not been, but should be, settled by this Court.

A. Conflict with Decisions of this Court.

This Court has held that a labor arbitration award under the Federal Arbitration Act should be enforced even if an ambiguity exists in an opinion accompanying the award, United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960) and has indicated that arbitrators need not disclose the facts or reasons for their award, Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198, 203-204, footnote "4",(1956).

In the case at bar the award on its face was certain and unconditional, namely, that one party should pay the other party a definite sum of money. No reason or opinion accompanied the award. We respectfully submit that in holding the award to be indefinite because it failed to mention one of the defenses presented to the Arbitrators, the Seventh Circuit Court of Appeals has decided an important question of federal law in a way in conflict with the above decisions of this Court.

B. A Question which should be settled by this Court.

If United Steelworkers of America v. Enterprise Wheel & Car Corp., supra, is for any reason considered not applicable to a commercial arbitration proceeding, then the decision below presents an important question of federal law in that field which has not been, but should be, settled by this Court. There does not appear to be any decision of this Court, in a commercial arbitration case, dealing with the meaning of the word

"definite" as used in Section 10(d) of the Federal Arbitration Act or with the power of a District Court in such a case to remand issues to an arbitration tribunal after a final award.

The question is a recurring one. See La Vale Plaza, Inc. v. R.S. Noonan, Inc., 378 F.2d 569, 572-573 (3d Cir. 1967), involving a common law arbitration and not the Federal Arbitration Act.

With the growing use of arbitration as a means of determining commercial disputes, it is important that this Court settle the question whether under the Federal Arbitration Act a District Court may go behind a lump-sum award, final and definite on its face, to ascertain whether the award is "definite" within the meaning of Section 10(d) of the Act. The award in this case follows the usual pattern of numerous awards under the administration of the American Arbitration Association and it would be difficult to conceive how an award could be any more definite than the one in the case at bar.

III. An exercise of this Court's power of supervision is called for.

In a case involving the Federal Arbitration Act this Court recently referred to "the plain meaning of the statute but also the unmistakeably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." Prima Paint Corporation v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967).

In this case, despite petitioner's promptness, more

than two years have elapsed since the arbitration proceeding was commenced and the award still remains not fully confirmed, since the District Court has reserved to itself all questions in respect to enforcement of the award, including the time and manner of its payment.

Section 9 of the Federal Arbitration Act (9 U.S.C. § 9) mandates confirmation of an award "unless the award is vacated, modified or corrected as prescribed in Sections 10 and 11 of this title." Petitioner contends that no grounds exist for vacation, modification or correction of the award.

With arbitration being favored as a method of settling disputes, it is important that this Court exercise its power of supervision by delineating the jurisdiction of the Federal District Courts in respect to the proper administration of the Federal Arbitration Act, so that the arbitration procedure may be speedy and not subject to delay and obstruction in the courts.

CONCLUSION

For the stated reasons, this petition for a Writ of Certiorari should be granted.

Dated: August 12, 1968

Respectfully submitted,

FRANCIS X. CONWAY
Attorney for Petitioner

APPENDICES TO PETITION

APPENDIX A

In The United States Court of Appeals for the Seventh Circuit

Opinion of the Court of Appeals

September Term, 1967 April Session, 1968

No. 16589
ARTHUR T. GALT and MAYWOOD PARK TROTTING ASSOCIATION, INC.,

Plaintiffs,

v.

LIBBEY-OWENS-FORD GLASS COMPANY and F.H. SPARKS CO., INC.,

Defendants,

-and-

THE GEORGE SOLLITT CONSTRUCTION COMPANY,

Intervening Plaintiff-Appellee,

v.

F. H. SPARKS CO., INC.,

Defendant-Appellant.

June 6, 1968

Appendix A

Before HASTINGS, SWYGERT and CUMMINGS, Circuit Judges.

CUMMINGS, Circuit Judge. In April 1967, we held that a dispute between F.H. Sparks Co., Inc. ("Sparks") and The George Sollitt Construction Company ("Sollitt") was subject to arbitration in accordance with the subcontract between those parties. The basic facts are stated in our earlier opinion and will not be repeated here. See 376 F.2d 711.

The claims submitted by Sparks to the three arbitrators were as follows:

(1) Sparks' cost for replacing six lights of glass damaged by wind storm (Sparks' invoice dated July 23, 1955) amounting to	$ 16,847.70
(2) Sparks' cost for the extra work of replacing broken lights of glass, protecting the glass and taking other precautionary measures (partly covered by invoices dated November 9, 1965) amounting to	143,440.66
(3) Sparks' increased general office and supervisory overhead resulting from the above extra work, amounting to .	23,607.94
(4) Alterations to steel brackets (Sparks' invoice dated September 22, 1965) amounting to	866.25
(5) Unpaid balance on Sparks' Contract with Sollitt, amounting to	62,093.45
Total Claims:	$246,856.00

In the arbitration proceedings, Sparks also sought reimbursement for expenses incurred in protecting the glass installed and in the hanging of tarpaulins. With the approval of Sparks, Sollitt's counsel requested the arbitrators to find that it was not responsible for the glass breakage at Maywood Park, Illinois.

Arbitration proceeded in Chicago from May 22 to May 25, 1967, and resulted in the following May 31, 1967, award:

> "1. GEORGE SOLLITT CONSTRUCTION COMPANY, hereinafter referred to as SOLLITT is not responsible in any way for breakage of glass at the Maywood Park Race Track.
>
> "2. In accordance with the items set forth in the Demand for Arbitration of F.H. SPARKS CO., INC., hereinafter referred to as SPARKS, dated May 31, 1966:

"Item 1 Granted —	$16,847.70
Item 2 Denied	
Item 3 Denied	
Item 4 Granted —	866.25
Item 5 Granted —	62,093.45
	$79,807.40

> "3. The amount of TWENTY THOUSAND ONE HUNDRED NINETY TWO DOLLARS AND SIXTY CENTS ($20,192.60) should be paid for protection and hanging tarpaulin.
>
> Accordingly, WE AWARD as follows:
> "1. SOLLITT shall pay to SPARKS the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00)* * *."

Shortly thereafter, Sparks filed a motion below to confirm the award pursuant to Section 9 of the Federal Arbitration Act (9 U.S.C. § 9). Subsequently, Sollitt filed a motion for an order compelling Sparks and Sollitt to submit to the same three arbitrators the question whether the payment clause of the subcontract between Sollitt and Sparks was within the arbitration clause of the subcontract.[1] Sollitt's motion also provided that if the arbitrators found the payment clause subject to arbitration, then they should proceed to determine the question whether Sparks was entitled to receive the amount of the award from Sollitt before Sollitt received it from the owner, the Arthur T. Galt Building Trust.

After a hearing on the matter, the District Court decided that it was uncertain whether the arbitrators had considered whether the payment clause was subject to arbitration under the arbitration clause and therefore granted Sollitt's motion and referred the above two questions to them. In separate letters, the three arbitrators answered these questions, and the District

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[1] The payment clause provided as follows:

"It shall be a condition to said payment to the Subcontractor that, from time to time as may be required by the General Contractor, said Subcontractor shall furnish to the General Contractor waivers of lien and satisfactory statements in writing, verified by affidavit, of the names of all parties furnishing materials and labor, and the amounts due and to become due each. It is further understood that the amounts paid from time to time shall be out of funds received from the Owner, and in proportion to amounts allocated by the Owner for the work included herein, as and when the value of the work or materials furnished is accepted."

The arbitration clause provided:

"ARTICLE 21. Both parties to this agreement hereby agree to be bound by the provisions of record in the American Institute of Architects and on file in the nearest Chapter of the American Institute of Architects, for Arbitration of disputes which may arise in connection with the performance of this agreement.

Court justifiably interpreted their responses as a finding by the arbitrators that the payment clause of the subcontract was not within the purview of the arbitration clause, so that the arbitrators concluded they were without jurisdiction to decide any questions arising out of the payment clause. Thereupon, the District Court confirmed the award but reserved for its own decision "all questions arising out of the 'payment clause,' including the enforcibility of said arbitration award, the times, manner and payment of said arbitration award and interest due on said arbitration award." Pursuant to Section 1292(b) of the Judicial Code (28 U.S.C. § 1292 [b]), the District Court certified that an interlocutory appeal was justified and this Court granted leave to appeal. The question of appealability was considered here at that time, and we adhere to that ruling that the interlocutory appeal tests were satisfied. Cf. Kraus v. Board of County Road Commissioners, 364 F.2d 919 (6th Cir. 1966).

The initial award of the arbitrators did not mention the payment clause, even though it had been relied upon by Sollitt before the arbitrators. Our examination of the relevant portions of the transcript of the arbitration proceedings convinces us that the arbitrators did not intend to determine the validity and applicability of the payment clause. After the award was rendered, Sollitt and Sparks disagreed whether the arbitrators had considered the effect of the payment clause.

After the release of our first opinion herein, the Supreme Court confirmed our view that controversies of this type are subject to arbitration under the United States Arbitration Act of 1925 (9 U.S.C. §§ 1-14). See Prima Paint v. Flood & Conklin, 388 U.S. 395. Section 10 of that statute empowers district courts to vacate awards and direct rehearings by the arbitrators where

a mutual, final, and definite award was not made if the time for rendering the award had not expired. Because the award did not mention the payment clause, even though that was one of the defenses presented to the arbitrators by Sollitt, the award was not definite within the meaning of Section 10(d) of the Act. Therefore, the court was warranted in remanding the payment clause questions to the arbitrators. It was entirely appropriate for the District Court to let the arbitrators explain whether they had interpreted the payment clause. This method commendably avoided any judicial guessing as to the meaning of the award. See La Vale Plaza, Inc. v. R. S. Noonan, Inc., 378 F.2d 569, 573 (3d Cir. 1967). It did not constitute a judicial invasion of the arbitrators' province but rather served to give the parties what they bargained for — a clear decision from the arbitrators.

Questions of arbitrability are initially for the arbitrators (Food Handlers Local 425 v. Plus Poultry Inc., 260 F.2d 835 [8th Cir. 1958]) and will not be disturbed if there is any basis therefor. See Steelworkers v. Enterprise Corp., 363 U.S. 593, 599; Prima Paint Corp. v. Flood & Conklin, 388 U.S. 395, 404; see also Sections 10 and 11 of the Federal Arbitration Act (9 U.S.C. §§ 10 and 11). Regardless of our views of the meaning of Article 21, the arbitrators could construe its limitation to disputes arising "in connection with the performance of this agreement" as precluding consideration of a clause dealing with payment. Cf. Ballantine Books Inc. v. Capital Distributing Co., 302 F.2d 17, 22 (2d Cir. 1962); Liberty Products Corp. v. H. K. Ferguson Co., 90 F. Supp. 673, 675 (E.D. N.Y. 1950). Therefore, it was proper for the court below to confirm the arbitrators' jurisdictional determination.

The order confirming the award but reserving certain questions for judicial decision is affirmed.[2]

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals
for the Seventh Circuit.

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2 While there was no appeal from the order of remand to the arbitrators, affirmance of the later order necessarily indicates approval of the interrelated remand order. We are not deciding the question raised about interest on the award, for the trial court has not yet passed upon it.

APPENDIX B

In The United States Court of Appeals for the Seventh Circuit

Opinion of the Court of Appeals on Prior Appeal

ARTHUR T. GALT and MAYWOOD PARK TROTTING ASSOCIATION, INC., an Illinois corporation,

Plaintiffs,

v.

LIBBEY-OWENS-FORD GLASS COMPANY, an Ohio corporation, and F. H. Sparks Co., Inc., a New York corporation,

Defendants.

The GEORGE SOLLITT CONSTRUCTION COMPANY, an Illinois corporation,

Intervening Plaintiff-Appellee,

v.

F.H. SPARKS CO., Inc., a New York corporation,

Defendant-Appellant.

No. 16024.

Appendix B

April 26, 1967.

Before HASTINGS, Chief Judge, and SWYGERT and CUMMINGS, Circuit Judges.

CUMMINGS, Circuit Judge.

In this diversity action, the plaintiffs sued to recover for damages occasioned by massive glass breakage at the Maywood Park racetrack in Maywood, Illinois. In 1964, plaintiffs decided to construct a new spectator building for viewing harness racing. The south side of the building was to be enclosed with glass. The plaintiffs created the Arthur T. Galt Building Trust ("Building Trust") to arrange for the construction of the new building, and Lionel K. Levy, a New York, N.Y., architect, was engaged to draw the plans. The George K. Sollitt Construction Company ("Sollit") of Chicago was chosen as the general contractor.

Defendant F. H. Sparks Co., Inc., ("Sparks") of New York was licensed by Glasbau Heinrich Hahn in the "suspended glazing" method of hanging curtain walls of glass without the usual metal framing supports. Plaintiffs authorized Levy to use the Sparks suspended glazing method at Maywood Park. Sollitt thereupon entered into a subcontract with Sparks for suspended glazing with glass manufactured by Libbey-Owens-Ford Glass Company ("LOF"). Article 21 of the subcontract provided that Sollitt and Sparks would be bound by the American Institute of Architects' provisions for arbitration of disputes. In pertinent part, those provisions are:

> "All disputes, claims or questions subject to arbitration under the Contract shall be submitted to arbitration in accordance with the provisions,

then obtaining, of the Standard Form of Arbitration Procedure of The American Institute of Architects,[1] and the Agreement shall be specifically enforceable under the prevailing arbitration law and judgment upon the award rendered may be entered in the court of the forum, state or federal, having jurisdiction. It is mutually agreed that the decision of the arbitrators shall be a condition precedent to any right of legal action that either party may have against the other."

According to the complaint, the suspended glazing installed by Sparks was unsatisfactory, with much of the glass cracking and breaking. Another company was employed by plaintiffs to remove the suspended glazing and install conventional glazing.

On May 31, 1966, Sparks commenced arbitration proceedings against Sollitt to recover $246,856, allegedly representing the unpaid balance on the subcontract and for extra work performed thereunder. Sparks and Sollitt each designated an arbitrator, and a third arbitrator was selected from a panel submitted by the American Arbitration Association. By stipulation, Sparks and Sollitt fixed the compensation of the third arbitrator. So far, Sparks has expended $1,943.71 in arbitration costs. Sollitt filed an answer in the arbitration proceedings, and its attorneys were permitted to examine Sparks' records in New York in order to expedite the arbitration hearings which were scheduled to commence in Chicago on October 18, 1966.

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1 An explanatory note to the Standard Form states that upon request, "information on the Federal and on the various State arbitration laws" will be furnished by the American Arbitration Association. The Standard Form does not make any particular arbitration statute applicable to the arbitration procedure of the American Institute of Architects.

Appendix B

In July 1966, Sollitt was considering the possibility of bringing the Building Trust into the arbitration proceedings, and Sparks suggested that "this be done immediately" if at all. However, neither the Building Trust nor plaintiffs have participated in the arbitration, even though Sollitt's counsel admitted at the oral argument that Sollitt could have "impleaded" at least the Building Trust.

On September 29, 1966, plaintiffs filed their complaint against LOF and Sparks. The first six counts sounded in tort. The seventh count sought to enjoin the arbitration proceedings brought by Sparks against Sollitt. On December 8, 1966, the District Court denied plaintiffs' motion for a temporary injunction to halt the arbitration proceedings. The primary ground for the District Court's ruling was that Sollitt was not a party to the lawsuit. The District Court also ruled that plaintiffs could intervene in the arbitration proceedings to protect their interests.

Two weeks later, under Rule 24(b) of the Federal Rules of Civil Procedure, Sollitt moved to intervene in the lawsuit as a party plaintiff, seeking a declaratory judgment that it was not indebted to Sparks and seeking a preliminary injunction restraining Sparks from proceeding with the arbitration proceedings, which had been adjourned to January 9, 1967. The District Court granted Sollitt permissive intervention and also enjoined the arbitration proceedings. The order permitting Sollitt to intervene is not appealable (4 Moore's Federal Practice (2d ed.) 1966 Cum. Supp. p. 40); therefore, this appeal questions only the propriety of the injunction.

Appendix B

Applicability of Federal Arbitration Act

As seen, the contract between Sparks and Sollitt provides that it "shall be specifically enforceable under the prevailing arbitration law, and judgment upon the award rendered may be entered in the court of the forum, state or federal, having jurisdiction." It is noteworthy that the contract does not refer to any specific arbitration statute. However, Section 2 of the Federal Arbitration Act (9 U.S.C. § 1 et seq.) is sufficiently broad to apply; it provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. § 2).

In turn, the Act defines commerce as including "commerce among the several States" (9 U.S.C. § 1). Unquestionably this contract evidences "a transaction involving commerce" within the meaning of the statute, for Sparks was a New York contractor and came to Illinois to perform the work with glass manufactured by LOF in Toledo, Ohio.[2] Therefore, we proceed to

2 See Monte v. Southern Delaware County Authority, 212 F.Supp. 604, 609-611 (E.D. Pa. 1963), reversed on other grounds 321 F.2d 870, 871-872 (3rd Cir. 1963); Metro Industrial Painting Corp. v. Terminal Construction, 287 F.2d 382, 384 (2dCir. 1961), certiorari denied, 368 U.S. 817, 82 S.Ct. 31, 7 L.Ed.2d 24.

the case law interpreting the Federal Arbitration Act to determine whether the injunction against arbitration was erroneous. If the Federal Arbitration Act were not involved, we would have to look at the Illinois Uniform Arbitration Act as interpreted by the Illinois courts. Butler Products Co. v. Unistrut Corporation, 367 F.2d 733, 735 (7th Cir. 1966).

Under the Federal Arbitration Act, the courts have been assigned the limited role of "ascertaining whether the party seeking arbitration is making a claim which on its face is one governed by the agreement." International Telephone and Telegraph Corporation v. Local 400, 286 F.2d 329, 330-331 (3rd Cir. 1961). As Judge Frank put it in Reconstruction Finance Corporation v. Harrisons & Crosfield, 204 F.2d 366, 368, 37 A.L.R. 2d 1117 (2d Cir. 1953), certiorari denied, 346 U.S. 854, 74 S. Ct. 69, 98 L. Ed. 368:

> " the provisions of that [Federal Arbitration] Act—9 U.S.C. §4—*** make it clear that a federal court, in a suit asking it to compel arbitration, should (except as noted below in discussing laches) deal with no issues except (1) the making of an agreement to arbitrate, and (2) the failure, neglect or refusal of the other party to perform that agreement."

The policy of the Federal Arbitration Act is to promote arbitration to accord with the intention of the parties and to ease court congestion. Robert Lawrence Company v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959), certiorari dismissed, 364 U.S. 801, 81 S. Ct. 27, 5 L. Ed. 2d 37. All doubts are to be resolved in favor of arbitration. Metro Industrial Painting Corp. v. Terminal Construction, 287 F.2d 382, 385 (2d Cir. 1961). Whenever possible, the courts will use the Federal

Arbitration Act to enforce agreements to arbitrate. See Monte v. Southern Delaware County Authority, 321 F.2d 870, 874 (3d Cir. 1963).

Here the subcontract between Sollitt and Sparks contained their promise to arbitrate. As in Krauss Bros. Lumber Co. v. Louis Bossert & Sons, 62 F.2d 1004, 1006 (2d Cir. 1933), Sollitt's motion to enjoin the arbitration proceedings was a repudiation of its own promise to arbitrate, giving Sparks an election to put an end to the arbitration clause or to insist upon its performance. Here Sparks has insisted upon performance, and its election must be honored, as Judge Learned Hand ruled in the Krauss case.[3]

In addition to the Lawrence and Lummus cases (supra, p. 714 and infra, p. 716), Prima Paint Corporation v. Flood & Conklin Mfg. Co., 360 F.2d 315 (2d Cir. 1966), certiorari granted, 385 U.S. 897, 87 S. Ct. 202, 17 L. Ed. 2d 130, holds that court proceedings should be stayed to permit arbitration. These decisions of course militate against the ruling below that arbitration should be stayed to permit subsequent court proceedings to continue. Furthermore, having participated in the arbitration proceedings, Sollitt may have waived any right to stay them. In re Hellenic Lines, Ltd. (Louis Dreyfus Corporation), 372 F.2d 753, 758 (2d Cir. 1967).

In an effort to support the preliminary injunction, Sollitt has cited two cases under the Federal Arbitration Act. But in Leesona Corp. v. Cotwool Mfg. Corp., 315 F.2d 538 (4th Cir. 1963), Leesona did not seek arbitration until more than a year after it had commenced an infringement action, whereas Sparks has

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3 The Krauss case was cited with approval by this Court in United States for Use and Benefit of Frank A. Trucco & Sons Co. v. Bregman Const. Corp., 256 F2d 851, 854 (7th Cir. 1958).

presented its timely claim only to arbitrators. The effect of the stay in Leesona would not permanently cut off arbitration because Huber, the other party to the arbitration agreement, was not involved in Leesona's infringement suit. Here Sollitt is attempting to proceed against Sparks in this lawsuit. Any judgment against Sparks in the lawsuit would of course be res adjudicata, thus effectively barring the very arbitration to which Sollitt and Sparks had agreed. Finally, the District Court in Leesona was motivated by the view that the determination of the status of a patent is inherently unsuited to arbitration. Leesona Corp. v. Cotwool Mfg. Corp., 204 F. Supp. 141, 143 (W.D. S.C. 1962).

In Stockwell v. Reynolds & Co., 252 F. Supp. 215 (S.D. N.Y. 1965), also relied upon by Sollitt, arbitration of Counts I and IV of the complaint was precluded by the doctrine of Wilko v. Swan, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168. Nevertheless, the District Court granted the defendants' motion that the subject matter of Counts II and III be submitted to arbitration. Arbitration of those Counts was stayed temporarily because arbitration of Counts I and IV was foreclosed by the Wilko case. Here no part of the dispute between Sparks and Sollitt is non-arbitrable. Moreover the Stockwell case held that "Under federal law, arbitration clauses are liberally construed" (252 F. Supp. at p. 220).

No statutory ground for a stay of arbitration was advanced by Sollitt (see 9 U.S.C. § 2). Sollitt should not be permitted to circumvent the arbitration contract. We conclude that the preliminary injunction was an unwarranted interference with the arbitration sanctioned by the Federal Act.[4]

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4 Sollitt's arguments about multiplicity and circuity of actions are discussed infra.

Applicability of Illinois Arbitration Act

If the Federal Arbitration Act is inapplicable to this diversity case for constitutional or other reasons,[5] then the Illinois Uniform Arbitration Act becomes pertinent. Under the Uniform Arbitration Act, as shown by its history, "the problem of judicial interference with the question of arbitrability was intended to be governed by § 2 ***." Layne-Minnesota Co. v. Regents of University of Minnesota, 266 Minn. 284, 290, 123 N.W. 2d 371, 376 (1963). Section 2(b) of the Illinois Act permits a court to stay an arbitration proceeding "on a showing that there is no agreement to arbitrate" (Ill. Rev. Stats. 1965, c. 10, § 102[b]). Section 2(d) of the Act provides:

> "Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this Section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay." (Emphasis supplied.)

Section 2 was interpreted in School District No. 46, etc. v. Del Bianco, 68 Ill. App. 2d 145, 215 N.E. 2d 25 (2d Dist. 1966), leave to appeal denied, 33 Ill. 2d 628 (1966). There the Court determined that "The sole issue under the Act on the preliminary hearings to compel or stay arbitration, is whether there is an agree-

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5. Cf. Prima Paint Corporation v. Flood & Conklin Mfg. Co., 360 F.2d 315 (2d Cir. 1966), certiorari granted, 385 U.S. 897, 87 S.Ct. 202, 17 L.Ed2d 130, and Robert Lawrence Company v. Devonshire Fabrics, Inc., 271 F.2d 402 (2dCir. 1959), certiorari dismissed, 364 U.S. 801, 81 S. Ct. 27, 5 L.Ed.2d 37, with Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199.

ment to arbitrate." In a well reasoned opinion, Justice Davis explained that the "provisions of the Act militate against the contention that a party to an arbitration agreement may choose between the judicial or arbitration forum" (68 Ill. App. 2d at p. 156, 215 N.E. 2d at p. 31). In a diversity action involving arbitration under a State statute, a Federal District Court has the powers of a State Court judge. Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 203, 76 S. Ct. 273, 100 L. Ed. 199. Therefore, the District Court's inquiry under the Illinois Act should have been whether or not there was an agreement to arbitrate. Section 2(d) of the Illinois Act shows that the Legislature contemplated multiplicity of actions. In enacting the Uniform Arbitration Act, the Legislature has not eradicated a chancellor's inherent powers, but the Legislature has determined in Section 2 that it is no longer equitable to enjoin arbitration to prevent multiplicity of actions. Arguments about multiplicity of litigation and circuity of action resembling those advanced here by Sollitt were rejected in Stadel v. Granger Brothers, Inc., 4 Mich. App. 250, 144 N.W.2d 609, 614 (1966), and Knolls Cooperative Section No. 1 v. Hennessy, 3 Misc. 2d 220, 150 N.Y.S. 2d 713, 716-717 (1966)[6] and unsuccessfully raised in the Del Bianco petition for leave to appeal.

Even if it were proper under the Illinois Act to enjoin arbitration to prevent multiplicity, this is not an appropriate case to do so. Here Sparks is not pressing its claim against Sollitt in more than one forum. Sparks has steadfastly sought to arbitrate its claim against Sollitt and is not responsible for the multiplicity or circuity problems asserted by Sollitt.

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6 Although *Knolls* is a nisi prius case, River Brand Rice Mills v. Latrobe Brewing Co., 305 N.Y.86, 110 N.E.2d 545, 548 (1953) is consistent therewith.

It should be noted too that the arbitration claim against Sollitt is purportedly based on the contract between Sollitt and Sparks, whereas the instant lawsuit sounds in tort. Moreover, the District Court could not completely dispose of this controversy in the present lawsuit, for neither the Building Trust nor architect Levy are parties. Sparks is trying to satisfy its claim only before the arbitrators. Sollitt had agreed to arbitration, and arbitration was commenced more than seven months before the District Court entered its stay order. If upheld, the injunction granted by the District Court would have the effect of wasting the time, money and effort that have already been put into the arbitration. Also, there was no need to enjoin the arbitration in order to protect Sollitt from inconsistent decisions. Concedely Sollitt could have brought the Building Trust into the arbitration proceedings if Sollitt feared that it might otherwise be forced to pay twice.

In conclusion, whether the arbitration is governed by the Federal or Illinois Acts, the preliminary injunction must be vacated and the Sparks-Sollitt phase of this lawsuit must be stayed[7] until completion of arbitration. We of course intimate no views as to the merits of Sparks' claim against Sollitt. Section 2(e) of the Illinois Act expressly reserves such questions for the arbitrators. See also Sections 3 and 4 of the Federal Arbitration Act (9 U.S.C. §§ 3 and 4).

Reversed and remanded.

7 See Lummus Company v. Commonwealth Oil Refining Co., 280 F.2d 915, 931, 91 A.L.R.2d 912 (1st Cir. 1960), certiorari denied, 364 U.S. 911, 81 S.Ct. 274, 5L.Ed 2d 225. Sollitt may decide to bring the Building Trust into the arbitration proceedings, and the plaintiffs may also decide to intervene therein in order to expedite the resolution of this controversy.

APPENDIX C

Oral Opinion of District Court

(Hon. Bernard M. Decker, D.J.)

* * *

The Court: Well, let me say this: I don't have any memorandum prepared but if you gentlemen want to take your seats I can give you at least the benefit of the thoughts that I have on the matter at this time.

As you gentlemen know, by virtue of an order of this court there was submitted to the Panel of Arbitrators in this case on June 27, 1967, the issue, first of all, as to whether or not the payment clause of the subcontract between Sollitt and Sparks was within the purview of the arbitration clause of the subcontract, and particularly of Article 21, and, secondly, if the arbitrators found that the payment clause was subject to arbitration, then the Panel of Arbitrators was to proceed to determine whether Sparks is herewith, and I am reading now from the matter submitted to me—"...is herewith ..."—this is the matter submitted to them—"...is herewith and immediately entitled to receive from Sollitt without Sollitt first receiving from Arthur T. Galt Building Trust, the owner, $100,879.60 and without such funds being allocated by the owners for payment to Sparks by Sollitt."

Now, let me say this: I recognize the fact that an arbitration proceeding is an informal proceeding; I recognize the fact that they are not tied down by technical pleadings and I recognize the fact that they don't proceed the same way that the court proceeds.

I also recognize the fact that arbitrators are

appointed on the basis that each of the interested parties appoints one and then the two of them selects a disinterested arbitrator.

I think, however, that there can be no question of the fact that an arbitration must proceed on some kind of a fair basis and that when the arbitration is finished I think that the parties to the matters in dispute are entitled to a definite statement from the arbitration panel deciding each of the issues in dispute so that there can be no question as to what the arbitrators finally decided.

Now, in this case, and I don't think that there can be any question about this; in this case at the time that this arbitration commenced the question immediately arose as to whether or not the arbitrators were going to be called upon to decide whether Sollitt, under the terms of this contract, would be required to pay whatever amount was found due on this arbitration to Sparks.

The issue was raised at the outset of the arbitration and Mr. Spencer, who was the only neutral involved in the arbitration, started off and said, and I quote, and you gentlemen are familiar with this because it appears in the transcript; he said: "I don't think that we can decide whether Sollitt owes you the money.

Mr. Hatton: I would agree.

Mr. Conway: Well, you have to make an award.

Mr. Spencer: Of a certain amount of monies of the legitimacy of your claim regarding the extra work.

Mr. Conway: Right, and it will be, however, an award by a claimant and against the respondent.

Mr. Hatton: No, sir, that is wrong.

Mr. Conway: Let me finish. What happens after this is a matter for the lawyers. That is the decision

of this court.

Mr. Spencer: How in hell you collect it, that's your business.

Mr. Conway: That's right.

Mr. Spencer: Not mine.

Mr. Conway: That is right."

Now, Mr. Spencer and the arbitrator whom I assume was appointed by Sollitt have both answered on the remand and they have done it as clearly as I think it can be done; they have both answered, on remand, that they do not consider, or did not consider, the payment clause as an arbitral clause; they have indicated as clearly as I think they can that they do not wish to become parties to the dispute between the owner, that is, Galt, Sollitt, and Sparks as to which, that is, whether the owner or the contractor is to furnish the funds to pay the sum due to Sparks and they determined that the interpretation of this clause was beyond the scope of the arbitration submitted to them and what they did, they took the five items which were submitted to them as the matters in controversy and they made a finding as to an amount of money and that finding stands and their award is going to stand so far as that amount of money is concerned; however, that is as far as they went and the award makes no statement as to when it is to be paid and how it is to be paid and it seems clear to me, and I don't think that the fact that this is an informal proceeding should allow any party to take advantage of the fact that it is informal and the fact that the arbitrators are not lawyers and I don't think that anyone should be misled by what happened in this proceeding.

It seems to me as clear as it can be that this award did not constitute an adjudication by the arbitrators as to the effect and the validity of the payment provisions of the subcontract between Sparks and Sollitt and the

interpretation of that clause and all questions relating to the time and the manner of the payment of the award are hereby reserved for the court, and when I say that I think that I am saying exactly what Mr. Conway said at the time that the arbitration proceedings commenced when he said: "Let me finish. What happens after this is a matter for the lawyers. That is a decision for the court."

And Mr. Spencer said: "How in hell you collect it, that's your business."

And Mr. Conway: "That's right."

The arbitrators did make a decision; they did, in order to comply with counsel said had to be done, they made an award. But I am not in a position to grant the motion to permit a judgment to be entered at this time against Sollitt on the basis that they are required to pay this award at this time.

Now, I will expect Sollitt to prepare a proper order which will give effect to the award insofar as it provides for the payment of this sum of money on these particular items but the other question that I said just now, or a moment ago, the judgment order will provide that it does not constitute, that the award does not constitute an adjudication as to the effect and validity of the payment provisions of the subcontract and the interpretation of that clause and all questions relating to the time and manner of the payment of such award are hereby reserved for the court.

* * *

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No. 411

In the Supreme Court of the United States

OCTOBER TERM, 1968

F. H. SPARKS CO., INC.,

Defendant-Petitioner,

vs.

THE GEORGE SOLLITT CONSTRUCTION COMPANY,

Intervening Plaintiff-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To: The Honorable Chief Justice and Associate Justices of the United States:

Respondent, The George Sollitt Construction Company ("Sollitt"), the intervening plaintiff in the action below, submits this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed on behalf of petitioner, the F. H. Sparks Company, Inc. ("Sparks"), defendant below.

QUESTIONS PRESENTED

1. Was it error for the District Court to confirm the arbitration award and to reserve to the Court questions which the arbitrators had held to be beyond their jurisdiction to consider?

2. Was it error for the District Court to partially vacate an arbitration award (in a manner which did not affect the findings of the arbitration panel or the lump sum award and who was to pay it) but which had failed to pass upon an important issue which had been presented to the arbitrators by one of the parties, said failure leaving the parties uncertain as to the time and manner the arbitration award was to be paid, and for the District Court to remand to the Panel that issue in accordance with Section 10(d) of the Federal Arbitration Act (9 U.S.C. §10(d))?

STATEMENT OF THE CASE

Because petitioner's statement of facts is replete with omissions which demonstrate the lack of conflict of decisions, the lack of any issues significant enough to warrant review by this Court and the correctness of the decisions below, respondent sets forth the following statement of facts.

The Principal Action Below

On September 29, 1966 a seven-count complaint was filed in the United States District Court for the Northern District of Illinois against Sparks and Libby-Owens-Ford ("L-O-F") Glass Company for damages allegedly sustained by plaintiffs* due to the failure of the "SparkSys-

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* The plaintiffs in the main case originally were Arthur T. Galt as owner of Maywood Park Race Track and Maywood Park Trotting Association. On March 13, 1967 the Arthur T. Galt Building Trust became a party-plaintiff.

tem" of suspended glazing installed at Maywood Park, (a race track located outside of Chicago) by Sparks with glass furnished by L-O-F. Jurisdiction of the District Court was based upon diversity of citizenship.

The seventh count of the complaint sought to enjoin arbitration proceedings pending between Sparks and Sollitt, but plaintiff's motion to enjoin was denied by the District Court on December 9, 1966.

The arbitration proceedings had been commenced on May 31, 1966 by Sparks notifying Sollitt of its intention to invoke arbitration proceedings for an alleged balance due it from Sollitt under its subcontract with Sollitt and for extra work performed at Maywood. (App. 26.)[1]

The Sparks-Sollitt Subcontract

Sparks was the alleged licensee of a glazing technique whereby large lights of glass were hung or suspended rather than rested on their base. This has been referred to as "suspended glazing" and was sold by Sparks in North America as the "SparkSystem." (R. 98-100.)[2]

Sollitt, as the general contractor, normally had sole discretion in the selection of subcontractors. However, as to the glazing for the main spectator building, Sollitt was directed by the Arthur T. Galt Building Trust ("Building Trust")[3] to subcontract with Sparks for the "SparkSys-

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[1] App. refers to pages of the appendix filed by Sollitt in the Court of Appeals for the Seventh Circuit which has been certified as part of the record herein.

[2] Refers to the Record herein.

[3] The Building Trust was created by Mr. Galt to arrange for and finance the construction work at Maywood Park.

tem of suspended glazing. The Sollitt-Sparks subcontract provided that:

> ". . . It shall be a condition to said payment to the Subcontractor, that, from time to time as may be required by the General Contractor, said Subcontractor shall furnish to the General Contractor waivers of lien and satisfactory statements in writing, verified by affidavit, of the names of all parties furnishing materials and labor, and the amounts due and to become due each. It is further understood that the amounts paid from time to time shall be out of funds received from the Owners [the Building Trust] and in proportion to amounts allocated by the Owner [the Building Trust] for the work included herein, as and when the value of the work or materials furnished is accepted." (Hereinafter referred to as the "payment clause.")

The subcontract also provided in Article 21:

> "Both parties to this agreement hereby agree to be bound by the provisions of record in the American Institute of Architects and on file in the nearest Chapter of the American Institute of Architects, for arbitration of disputes which may arise in connection with the performance of this agreement." (Hereinafter referred to as the "arbitration clause.")

Sparks was fully cognizant of the existence, meaning and effect of the payment clause "on its right to be paid" and that it was contingent upon Sollitt being (1) paid by the Building Trust, and (2) the Building Trust expressly allocating funds for payment by Sollitt to Sparks.

On April 1, 1965 Mr. G. F. Collyer of Sparks wrote Sollitt objecting to the payment clause and suggesting an alternative clause. (App. 4.) On April 6, 1965, Mr. Collyer again wrote Sollitt saying it did not want Sparks' "right to payment to be subject to someone else's ability to collect." (App. 6.)

Despite the reluctance of Sparks, and even though Sollitt was ordered by the Building Trust to subcontract with Sparks thereby depriving Sollitt of any bargaining power it might have had, Sparks duly executed the subcontract, as originally sent it by Sollitt, and agreed, with full understanding, to the terms and conditions of the payment clause.

Failure of the "SparkSystem"

Even before all of the lights of glass were in place at Maywood Park some of them, installed pursuant to the "SparkSystem" and by Sparks personnel, began to crack and break. At no time was the installation 100% unbroken. In December, 1965, the project architect informed Sollitt and Sparks that the "SparkSystem" was not acceptable and had not met the contract guarantees. The lights of glass installed pursuant to the "SparkSystem" were subsequently removed and conventional glazing installed.

The First Appeal to the Court of Appeals

On December 23, 1966 Sollitt was allowed to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure as a party plaintiff in the primary proceedings brought in the District Court. On January 19, 1967, the District Court granted Sollitt's motion to stay the arbitration proceedings.

On April 29, 1967 the United States Court of Appeals for the Seventh Circuit reversed the District Court's order of January 19, 1967, and stayed all legal proceedings between Sparks and Sollitt until the parties had concluded arbitration.*

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* *Galt* v. *Libbey-Owens-Ford Glass Co.*, 376 F.2d 711 (7th Cir. 1967).

The Court intimated no views as to the merits of Sparks' claims against Sollitt.

The Arbitration Proceedings

On May 22, 1967 through May 25, 1967, three arbitrators, Mr. Frederick Wiesinger, selected by Sollitt, Mr. Peter DeJongh, selected by Sparks and Mr. A. L. Spencer, selected by Messrs. Wiesinger and DeJongh, heard evidence and rendered informally a two to one decision that found that Sparks was entitled to receive $100,000.00 on its claims and $879.60 for expenses incurred as a result of the arbitration proceedings. All three arbitrators also agreed, pursuant to the request of counsel for Sollitt and to which counsel for Sparks did not object, that Sollitt was in no way responsible for the glass breakage at Maywood Park.*

On May 31, 1967 the findings and award of the arbitrators were reduced to writing and sent to the parties. That written award provided, in part, that "Sollitt shall pay to Sparks the sum of . . ." (App. 8.)

The award did not state the time or manner in which the award was to be paid. Both of these issues had been raised by Sollitt at the outset of the proceedings and in its opening and closing arguments.

After Sollitt's opening statement, Mr. Spencer stated that he felt the Arbitration Panel was without jurisdiction to consider how or when an award, if any, would be collected. (App. 9-12.) Mr. Conway, counsel for Sparks, apparently agreed. (App. 11.)

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* Sparks in its petition to this Court attempts to imply that this fact was not fully understood by the Court of Appeals. However, the briefs and Court's opinion totally rebuke this position of Sparks.

Sollitt, in its closing statement to the Panel, requested a decision by the Arbitration Panel as to the time and manner payment would be made to Sparks if an award was rendered against Sollitt running to Sparks. However, nowhere in the record of proceedings or in the written award did the Panel state that Sparks was entitled to immediate payment of any arbitration award or that payment to Sparks was contingent upon Sollitt first being paid by the Building Trust and the Building Trust allocating the funds for payment to Sparks. Therefore, the parties were placed in the position of not knowing whether the payment clause was to apply or not to the payment of the award.

Post-Arbitration Motions

On June 7, 1967 Sparks served Sollitt with several motions, including a motion to confirm the arbitration award of May 31, 1967. On June 12, 1967 Sollitt filed its answer to Sparks' motion to confirm and also moved to modify the award.

The District Court Order of June 22, 1967

On June 22, 1967 Sollitt, pursuant to Sections 4 and 10 of the Federal Arbitration Act (9 U.S.C. §§ 4, 10 (1965)), moved:

> (1) to vacate the award, provided that vacation of the award would in no way affect the finding by the Arbitration Panel that Sparks was entitled to the sum of $100,879.60 or that Sollitt was not responsible for the glass breakage.
>
> (2) Sparks and Sollitt be compelled to submit to the Panel the questions of :
>
> (a) whether the 'payment clause' was within the purview of the 'arbitration clause'; and
>
> (b) if it was, whether Sparks was entitled to immediately receive $100,879.60 from Sollitt, without Sollitt first receiving from the Building Trust

> $100,879.60 and without such funds being allocated by the Building Trust for payment to Sparks. (App. 16-18.)
>
> (3) The Court continue generally all the motions filed by Sparks and Sollitt."

The District Court granted Sollitt's motion in its entirety, having found that it was uncertain that the Panel had considered or decided whether it could consider the payment clause. The District Court observed that neither the manner nor the time for payment of the award to Sparks was stated on the face of the award, even though such issues were presented to the Panel for a determination and that a determination was needed in the interest of justice. The Court rather than holding, as Sollitt suggested, that the Panel considered itself to be without jurisdiction to consider the payment clause as being the reason why the award was silent as to time and manner the award was to be paid, remanded that issue to the Panel.

The Remand

On remand to the arbitrators, all filed letters with the American Arbitration Association. Mr. Spencer twice stated that it was his decision that the Panel was without jurisdiction. He said in part:

> ". . . 2. Both sides were clearly informed that, under no conditions would this Panel decide how the money was to be collected and from whom." (App. 21)*

Mr. Wiesinger agreed that the Panel did not have jurisdic-

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* While it is true as Sparks harps that Mr. Spencer questioned the "equity" of such clauses as the payment clause, he did not question its use in the Sollitt-Sparks subcontract. In fact, Mr. Spencer seemingly approved of it in that Sollitt was only the agent of the Building Trust and that the Building Trust had compelled Sollitt to subcontract with Sparks. (App. 22.) Thus Sollitt should have some way to protect itself.

tion. (App. 23-24.) Mr. DeJongh apparently agreed that the Panel was without jurisdiction and then disagreed. (App. 24-25.)

The District Court Order of October 19, 1967

On October 19, 1967, the District Court entered the order purportedly appealed from by Sparks. That order provided:

> (1) The findings of the arbitrators that Sparks was entitled to receive $100,879.60 and that Sollitt was not responsible for breakage of glass at Maywood Park were confirmed.
>
> (2) The findings by the arbitrators that the 'payment clause' of the Sollitt-Sparks subcontract was not within the purview of the 'arbitration clause' of the Sollitt-Sparks subcontract and the resulting conclusion that the Panel was without jurisdiction to decide all questions arising out of such 'payment clause' were confirmed.
>
> (3) As a result of the arbitrators' decision, all questions arising out of the 'payment clause' were reserved to the District Court and continued generally.
>
> (4) Except as otherwise provided, the continued motions of Sparks and Sollitt were denied. (App. 29-31.)

The Second Appeal to the Court of Appeals

Sparks sought and was granted under 28 U.S.C. §1292(b) certification by the District Court to appeal to the Seventh Circuit the October 19, 1967 order. The Court of Appeals granted the appeal. Briefs were filed and oral arguments were heard.

On June 6, 1968, a unanimous decision was rendered by the Court affirming the District Court's order of October 19, 1967.*

It is from that decision that Sparks seeks this Court to grant a writ of certiorari.

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* The Court noted that this decision necessarily indicated approval of the remand order of June 22, 1967.

ARGUMENT

I.

Sparks Seeks To Have An Order Not In Issue Reviewed.

At the outset, the order from which an interlocutory appeal was granted by the District Court and Seventh Circuit and is purportedly the one Sparks seeks this Court to review was the order of the District Court of October 19, 1967, which confirmed the award of the arbitrators that Sollitt shall pay Sparks $100,879.60 and confirmed the decision of the arbitrators, on remand, that they did not have jurisdiction to consider the payment clause. However, in its petition to this Court Sparks in reality seeks to have reviewed questions arising out of the remand order of June 22, 1967. This alone is sufficient grounds to deny Sparks' petition.

This alone is sufficient grounds to deny Sparks' petition.

II.

There Is No Conflict In Decisions Among the Courts of Appeal Over the Definition of The Word "Definite" Used in 9 U.S.C. § 10 (1965).

The case relied upon by Sparks as being in conflict with the decision of the Seventh Circuit in the case at issue clearly demonstrates that Sparks' contention is wholly frivolous, and if anything the authorities relied upon by Sparks show the correctness of that decision.

In *Ballantine Books, Inc.* v. *Capital Distributing Co.*, 302 F.2d 17 (2d Cir. 1962), Capital had contracted to distribute books for Ballantine. Capital made partial payment to Ballantine for the books received but, because wholesalers bought the books from Capital with the right to return them, Capital was not liable to Ballantine for the balance until six months after specific title passed to the

wholesalers. Capital thus acquired reserves against returns from wholesalers for which it was accountable to Ballantine.

When Capital had refused to pay some $175,000.00 which Ballantine alleged was due it, Ballantine commenced arbitration pursuant to the contract. Among the disputed sums were $4,421.28 allegedly owed to third parties. The arbitrators awarded a lump sum, $151,343.84, to Ballantine as full settlement of all claims. It appears that there was never any issue of the time and manner the award was to be paid to Ballentine.

Capital moved to set aside the award but it was confirmed by the District Court. On appeal one of Capital's objections was that the award was indefinite because it failed to specifically mention the $4,421.28—that is, the arbitrators had not apparently stated how it arrived at the sum of $151,343.84, or whether it included the $4,421.28. This argument was rejected by the Court of Appeals on the ground that it was not proper for the courts to inquire how the arbitrators reached the lump sum figure. 302 F.2d at 22. Furthermore, the court said these were "alleged minor disputes."

In this action, the arbitrators' award of $100,000.00 to Sparks is not now questioned nor was it ever questioned by the Courts below or by Sollitt, nor has the requirement that "Sollitt shall pay Sparks" ever been in issue in the courts below. What had been in issue and was key to an unambiguous and definite award was for the arbitrators to state the *time* and *manner* payment of the award was to be made or to say why the award was silent to this issue. The words "Sollitt shall pay Sparks" did not provide the answer.

Sollitt suggested to the District Court that the silence of the Panel was due to the fact that the Panel felt such questions were beyond its jurisdiction to decide. Clearly,

as the decision on remand showed, the Panel reasserted that it did not consider itself to have jurisdiction to decide those issues which would arise out of the payment clause and therefore had properly refused to enter in the written award any decision or finding whatsoever about the time and manner of payment of the award.

However, because the award failed to state the reason why nothing was decided about the time and manner payment of the award was to be made, especially in light of Sollitt having submitted questions arising out of the payment clause to the Panel, the parties were uncertain whether under the circumstances the arbitrators had considered the payment clause or what Sollitt was to do and under what conditions, if any, it was to pay Sparks. Thus, the award on its face was not "mutual, final or definite", as required under the Federal Arbitration Act before the award could be confirmed by the District Court.

In *Ballantine Books, Inc.* v. *Capital Distri. Co.*, 302 F.2d 17 (2d Cir. 1962), the question was whether the court should refuse to confirm an award when there was no reason not to think that the lump sum award included a provision for *all* claims between the parties. Here the District Court confirmed the lump sum award to Sparks for here also there was no reason not to think that the lump sum included a provision for all claims between the parties. In *Ballantine* the obligation of the parties was clearly settled in that the lump sum was stated on the face of the award to be in settlement of all claims. Here, however, Sollitt and Sparks still had unanswered the vital issue of the time and manner the award was to be paid. In *Ballantine* there never was any question as to the time and manner the award was to be paid. In this case the award was indefinite because the time and manner the award was to be paid was a major issue which went beyond the mere awarding of a lump sum.

Sparks thus misconstrues the decision of the Court of Appeals in this case as it does the decision of the Court in *Ballantine,* in that the two cases, standing side by side, are totally consistent, insofar as the meaning given by the courts of the term "definite." There is no conflict.

III.

There is No Important Question of Federal Law Presented in This Case.

A. There Is No Conflict With Decisions of This Court.

The remand order of June 22, 1967 by the District Court was fully in keeping with the decision of this Court in *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.;* 363 U.S. 593 (1960). In that case this Court modified the decision of the District Court so as to require remand to the arbitrators the question of the amounts due employees under a collective bargaining agreement, rather than having the District Court render the decision (363 U.S. at 599):

> "This underlines the fundamental error which we have alluded to in *United Steelworkers of America* v. *American Manufacturing Co.,* [363 U.S. 564 (1960)] decided this day. As we there emphasized, the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

This is precisely what the District Court did in this case; it did not invalidate the entire award but rather remanded

only the issues of the payment clause to the Panel* so as to have the judgment of the arbitrators rather than trying to second guess them. This decision gave the parties what they bargained for—a determination by the arbitrators of why they had not passed on questions arising out of the payment clause.

Likewise, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), supports the District Court's action and also demonstrates the lack of any conflict with the decisions of this Court. There this Court held that courts should not interfere when the parties have agreed to arbitration. There the decision was that questions of fraud in the inducement of the contract giving rise to the arbitration should be submitted to the arbitrator when the contract provided that all disputes under the contract were to be resolved by this means.

In the present case, the District Court properly deferred to the arbitrators in resolving an issue that had not been determined in their award—one that both parties were entitled to have an answer to—the question of the time and manner the award is to be paid by Sollitt to Sparks.

The authorities are clear that when an important issue is submitted to an arbitration panel and the award of the panel does not pass on that issue, the award is indefinite. Then remand to the panel is a proper method of disposing of the issue. Such a procedure does not in those

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* It is clear that the District Court did not have to search the record of the arbitration proceedings as Sparks suggests for on the face of the award it was impossible to tell whether the arbitrators considered themselves to have jurisdiction over the payment clause or whether they considered it, if they did, and ruled on it.

cases, any more than it did here, require the arbitrators to reconsider the legal basis of their award. Such is clearly the intent of section 10(d) of the Federal Arbitration Act in allowing a remand. *E.g., International Ass'n of M. & A. Wkrs.* v. *Aerojet-General Corp.*, 263 F.Supp. 343 (D.C. Cal. 1966); *Todd Shipyards Corp.*, v. *Industrial U. of Marine & Ship Wkrs.*, 242 F.Supp. 606 (D.N.J. 1965); *Carr* v. *American Ins. Co.*, 152 F.Supp. 700 (E.D. Tenn. 1957); *Arlington Towers Land Corp.* v. *John McShain, Inc.*, 150 F.Supp. 904, 925 (D.C. Dist. 1957); *Application of Zephyr Const. Co., Inc.*, 7 A.D. 2d 915, 182 N.Y.S. 2d 946 (1959);* *Overseas Distrs. Exch., Inc.* v. *Benedict Bros. & Co., Inc.*, 5 A.D. 2d 498, 173 N.Y.S. 2d 110, 112 (1958);* *In Re E. A. Laboratories, Inc.*, 50 N.Y.S. 2d 222, 223 (Sup. Ct. 1944);* *Cf., LaVale Plaza, Inc.* v. *R. S. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir. 1967).

As the above cases clearly indicate there is no conflict with the decisions of this Court. The decision of the Seventh Circuit is in accord with *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) and *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956). The lower federal courts have had no difficulty in determining a consistent meaning to be given the term "definite" under 9 U.S.C. § 10(d) (1965), and acting in accordance with decisions of this Court.

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* The New York Arbitration Act and cases under it may be looked to to aid in interpreting the Federal Arbitration Act. *The Hartbridge*, 57 F.2d 672, 673 (2d Cir. 1932), cert. denied, 288 U.S. 601 (1933).

B. There Is No Question That Needs to Be Settled By This Court.

There is no question presented by Sparks or this case worthy of a discussion by this Court. Sparks misconstruing questions of how a "lump sum" award is reached by the Arbitrators with questions of how a "lump sum" award is to be paid when such is an issue between the parties clearly shows the lack of any meritorious question.

Furthermore, the very case Sparks relies upon as showing a "recurring" problem is one that does not even discuss or consider the Federal Arbitration Act. *LaVale Plaza, Inc.* v. *R. S. Noonan, Inc.*, 378 F.2d 569 (3d Cir. 1967). That case also is consistent with other decisions of the Federal Courts which have in fact been confronted with issues arising under the Federal Arbitration Act.

IV.

There Is No Need For This Court To Exercise Its Power Of Supervision.

Sparks audaciously calls for this Court to overrule a decision which has called for arbitrators to render answers to issues that have been presented to them, and that confirms those very answers. True, more than two years have elapsed since the arbitration proceeding was commenced, but the very fact that the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) was enacted was to assure to those who so chose to use arbitration that arbitration be used to decide issues of dispute between the parties. *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Clearly Sollitt should not be penalized for using the pro-

cedures provided under the case law and by the Federal Arbitration Act as Sparks seeks to have this Court do.

Now that the arbitrators have answered unequivocally in a manner that Sparks does not like, Sparks seeks to subvert the arbitration and judicial procedures provided under the Federal Arbitration Act by having an award confirmed that left the parties with an important issue unresolved. Now because the arbitrators have stated that they are without jurisdiction to determine that issue, it is a proper one for the District court to decide. See *J. P. Greathouse Steel Erectors, Inc.* v. *Blount Bros. Constr. Co.*, 374 F.2d 324 (D.C. Cir.) cert. denied, 389 U.S. 847 (1967). Sparks, if it desires to have a speedy adjudication of the time and manner the award is to be paid by Sollitt, should seek to expedite the procedures in the court below, rather than attempting to disclaim the acts of the arbitration process which at one time it so ardently sought.

Finally, because of the uniqueness of the Sollitt-Sparks subcontract and factual background of this case, it is highly unlikely that the decision of Seventh Circuit will affect others.

There is no reason given in Sparks' petition nor is there one sufficient to require this Court to grant the petition for writ of certiorari on the basis that an exercise of this Court's supervisory powers is called for.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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